Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Nondiscrimination in the Distribution of	)	CS Docket No. 01-7
Interactive Television Services Over Cable	)	

REPLY COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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The National Cable & Telecommunications Association ("NCTA") hereby submits its reply comments in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

The initial round of comments in this proceeding confirms what was obvious from the outset: It is not only extremely premature but also counterproductive and contrary to the public interest to contemplate regulating interactive television at this time.

Everyone agrees that ITV is still in the earliest stages of development. To most parties, this fact tips the scales heavily against any notion of imposing common-carrier type nondiscrimination requirements. This is a time when facilities for the provision of ITV services still need to be built, when ITV service providers need substantial investment capital to develop services and technology, and when cable operators and other competing distributors need to experiment with the provision of such services in order to determine which ones will be valuable to customers. These are the *real* "building blocks" of ITV, and threatening to substitute regulation for marketplace forces will stifle all of them.

But some parties – mostly broadcasters and broadcast networks – think that the Commission *should* intervene, *right now*, to guarantee that the ITV services that they choose to develop will be carried on cable's facilities to cable's customers on regulated terms and conditions. One set of comments[1] argues that cable's facilities are essential to those who wish to provide ITV services and that, unless constrained by regulation, cable operators are sure to discriminate against unaffiliated ITV providers in an anticompetitive manner. As NCTA showed in its initial comments, neither of these arguments is supportable in theory or in fact.

The comments of ITV service providers confirm that the use of cable facilities is hardly the only means of delivering the services they currently provide. There's no reason to expect cable facilities to be any more essential in the future for whatever services the broadcasters and other supporters of regulation might provide. Service providers are already using, or contemplating the use of, DBS, wireless transport, DSL, and digital broadcasting (as well as basic telephone service) for both the downstream and upstream components of ITV services. Indeed, in Europe, satellite transmission is now the principal means of providing ITV services.

Moreover, even if cable were the only transport facility that could be used to provide certain ITV services that are still on the drawing boards or not yet imagined, the use of any *particular* cable system to deliver ITV services would still not be essential. The ITV services described in the comments and in the Notice appear to be *national* services. And there is no monolithic gatekeeper controlling access to 100% of cable facilities nationwide.

Each cable operator makes its own decision regarding the services that it provides to its customers – and, in making that decision, it has little or no incentive to favor an affiliated service by discriminating against an unaffiliated one. Professor Einer Elhauge, in a paper submitted with

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[1] *See* Comments of the Non-MVPD Owned Programming Networks ("Disney et al.").

NCTA's initial comments, explained at length why this is so and why cable operators have a strong economic interest in providing the services that offer customers the best value.

It is especially odd that Disney et al. would argue that vertically integrated companies can be expected to discriminate unfairly against unaffiliated companies, since they have aggressively contested that notion elsewhere. In any event, neither they nor any other proponents of regulation provide any evidence that cable operators *have* engaged in any such unfair or anticompetitive discrimination against unaffiliated providers of ITV services. Nor do the proponents of regulation provide any economic or antitrust analyses to support their bald assertions that cable operators *will* engage in such behavior.

The proponents of regulation rehash fuzzy arguments about maintaining the "openness" of the Internet, as if ITV were an advanced form of Internet access that would ultimately displace the PC-based broadband Internet access that is already available to consumers. But, as the initial comments of NCTA and others showed, most of the ITV services provided or contemplated by cable systems are different from – and, in many cases, have nothing to do with – access to the Internet. For the most part, they are services that complement and enhance the multichannel video programming offerings of cable systems.

Indeed, the "enhanced TV" services that Disney and other proponents of regulation want to provide using cable facilities are not Internet access services. They are, like the Disney services that are already available to cable customers, *programming* services. There is no evidence that these companies or any other programmers have been stymied by a market failure in negotiating with cable operators for the carriage of their program networks. And there is no reason to expect that, to the extent that cable facilities are capable of accommodating interactive enhancements,

they would be stymied in negotiating for carriage of any ITV services that are likely to enhance rather than detract from the viewing experience of cable customers.

But the one thing that the proponents of regulation do *not* want is unregulated marketplace negotiation for the provision of their ITV services. These services are undoubtedly intended to enhance the revenues of the programmers that provide them – but the extent to which they do so will vary depending on the type of service and its attractiveness to viewers. They may also conceivably enhance the value of the programming to the cable operator – but this, too, will vary for similar reasons.

In true marketplace negotiations, these variable factors would determine the terms and conditions of agreements between programmers and cable operators for the carriage of ITV enhancements. Indeed, they would determine whether carriage of a particular ITV service – or any other service, for that matter – on a cable system made economic sense at all. Cable operators would not take on the risk of investing in upgraded facilities unless they expected to use those facilities in a way that compensated them for that risk. And once such facilities are deployed, they would not be used for services that did not offer the cable operator a reasonable return on that investment – or for services that diminished customer satisfaction or displaced other desirable services.

In cavalierly urging a "nondiscrimination" requirement in the absence of any evidence of market failure, Disney et al. and other broadcasters simply want guaranteed use of cable facilities to provide ITV services on the same terms and conditions as the cable operator and its affiliates, without regard to these marketplaces forces. There is nothing pro-competitive about this grab for additional negotiating leverage. To the contrary, as our economic and antitrust analyses showed, imposing this sort of regulation on the nascent business of ITV would have severe *anti*competitive

effects, thwarting innovation, investment and efficient deployment and use of ITV facilities and services.

It is not just cable operators who made this point in their initial comments. Unaffiliated companies such as OpenTV and Canal+, who are in the forefront of ITV development, also explained why regulation would deter investment not only in ITV services but also in the facilities needed to foster the growth of such services. Moreover, even if there were any real prospect of anticompetitive discrimination – which there is not – efforts to prevent such discrimination through regulation would be enormously complex, costly, and, in the end, more likely to distort than promote competitive outcomes. The array of proposed regulatory structures and requirements set forth in the comments provides an ominous signal of what lies down that path.

For all these reasons, the prospect of regulating ITV at this time should be unthinkable, wholly apart from any jurisdictional or constitutional barriers to such regulation. But the comments also confirm that, in any event, there are such barriers – and they are insurmountable. The services identified by the *Notice* and by the parties as ITV services generally appear to be "cable services," which the Commission is barred from regulating in the manner proposed by the proponents of regulation. And, as several parties show, even if some conceivable ITV services could be classified as "information services" but not "cable services," the Commission would still lack authority, under its own precedents and under the Communications Act, to impose such regulation.

Finally, what is at issue here is the regulation of protected speech – although none of the proponents of regulation have responded to the *Notice*'s request for comment on the "constitutional implications" of the "nondiscrimination" requirements proposed in the *Notice* and by various parties. Those proposals are, at bottom, regulations that would force cable operators

to carry certain ITV content in a certain manner on certain terms and conditions in the package of program services that they offer and provide to their customers.

Under the First Amendment, the Commission could not impose such requirements unless they were necessary to serve a very important government interest and were narrowly tailored to serve that interest. Mere speculation that there might someday be a problem that might need to be solved does not come close to justifying such regulation of speech. Especially where, as here, even such speculation has no basis in fact or economic theory, the constitutional barriers to regulation provide yet another independent reason for bringing this inquiry to a rapid conclusion.

I. THERE IS NO EVIDENCE OF A PROBLEM THAT WARRANTS REGULATION OF NASCENT ITV SERVICES

One thing on which just about all commenting parties agree is that ITV is still an ill-defined cluster of nascent and contemplated services. And most parties also agree that some of these services are likely someday to prove very attractive to consumers. But there is sharp disagreement over the role that regulation should play in getting ITV from here to there.

To the majority of commenters (including NCTA), it seems clear that any talk of regulation at this time is exceedingly premature and counterproductive. They see no evidence at this stage that allowing ITV to develop according to the dictates of the marketplace will have any negative or anticompetitive effects, and they show that there is no basis in economic theory for expecting any such effects. What concerns these parties, therefore, is that regulation will deter, delay and distort the marketplace development of services that would be attractive to television viewers.

A handful of parties – primarily broadcasters and programmers affiliated with broadcast networks and stations – have a different view. They would have the Commission presume from

the outset that cable facilities will be essential to the provision of ITV services and that cable operators will engage in anticompetitive discrimination against unaffiliated providers of ITV services that need to use those facilities. And, to nip this presumed problem in the bud, they would have the Commission impose on this nascent business an array of "nondiscrimination" regulations and requirements that resemble those imposed on common carriers and on "essential facilities" that have been found to have already violated the antitrust laws.

Marketplace intervention of this sort is extraordinary even where a facility *is* essential, and even where there *is* a demonstration or inevitable prospect of anticompetitive conduct. The costs and distorting effects of regulation are often likely to outweigh the benefits. In this case, however, wholly apart from the adverse effects of regulation, these presumptions of marketplace failures are utterly unwarranted and unsupported.

A. There Is No Basis for Presuming that Cable Facilities Are or Will Be Essential for the Provision of ITV Services

Everybody concedes that ITV is in its "infancy," and nobody knows what interactive services will be developed in the future.[2] Yet some parties seem certain that cable facilities will be essential to the provision of those services. The National Association of Broadcasters, for example, asserts that there are "no other competitively viable distribution platforms for delivering

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[2] *See, e.g.*, ALTV at 3 ("ITV is still a new and evolving technology"); DirecTV at 2 ("ITV services and technologies are still evolving to find or create markets for ITV services); Public Broadcasting Service and Association of America's Public Television Stations at 7 ("At this early stage of the development of ITV, public television, along with the rest of the industry, continues to discover new facts and issues related to ITV almost on a daily basis"); TiVo at 1-2 ("In many respects, the NOI is perhaps ahead of its time as many fundamental questions are still being asked, including who are ITV providers, how will ITV services be delivered, what are the business models, a[nd] so forth); Canal+ Technologies at 1 ("The ITV industry is at a nascent stage. With technology and business models evolving at a rapid pace, it is difficult to provide a clear definition of ITV services"). *See also, e.g.*, Progress & Freedom Foundation at 5; Scripps Networks at 1; Golf Channel et al. at 1; Charter Communications, Inc. at 2; AT&T at 1-8; National Football League at 2; AOL Time Warner at 3; Cablevision Systems Corporation at 2; Comcast Corporation at 5-7.

the full range of interactive services."[3] EchoStar Satellite Corporation, while urging the Commission to "actively encourage competition to the cable platform in the provision of interactive services," suggests that no such competition is possible, since "cable operators appear in most cases to control the exclusive pipe for providing truly broadband ITV services to the home" and "[c]ompetitors could not reasonably be expected to duplicate this essential facility."[4]

But most of the commenting parties recognize that there is no basis for writing off the prospect – indeed, the fact – of facilities-based competition in the provision of ITV services. NCTA's initial comments show, with numerous specific examples, that "[c]able television is by no means the only entrant into the interactive arena" and that "many competitors are also beginning to offer interactive products making no use of cable facilities at all."[5] And that evidence is confirmed in the comments of others.

Thus, Cablevision Systems Corporation, AT&T, and The Golf Channel, Outdoor Life Network, Speedvision Network and The Weather Channel all catalogue at length the offerings and announcements of ITV services to be delivered by DBS, DSL, broadcasting, broadband wireless, and other non-cable facilities.[6] In addition, AT&T's comments specifically rebut the notion that cable's "return path" will somehow preclude the use of competitive facilities. As AT&T shows, (1) many ITV services do not need or use a return path; (2) for some services that require a return path, a *narrowband* return path is often sufficient; and (3) even where high-speed, real-time, two-way bandwidth is required, DBS and other competitors have or will have two-way,

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3 NAB at 17.

4 EchoStar at 3-4. *See also* Disney et al. at 14 ("Broadband cable . . . is the only distribution platform capable of delivering the full ITV experience to consumers in a cost-effective manner").

5 NCTA at 20.

6 Cablevision at 15-17; AT&T at 11-23; Golf Channel, et al. at 10-13.

high-speed connections that can be expected to compete effectively with cable facilities (whose upstream capacity is inherently limited).[7]

SBC and BellSouth also acknowledge that "alternative platforms – DSL, fixed wireless, and satellite – may provide enough 'actual and potential competition' to limit cable's market power, and to remove any basis for regulating the cable platform on a common-carrier basis."[8] And DIRECTV confirms that "there are as yet no dominant providers of ITV services, and the marketplace is still in the process of sorting out the technological standards that will govern ITV service delivery."[9]

The global perspective of Canal+ Technologies, which has been "developing and deploying ITV systems around the world,"[10] confirms that there is no basis for treating cable facilities as essential. Canal+, which supports "a multi-platform distribution approach to ITV," notes that "[s]uch an approach is fully supported by the experience in Europe where ITV services are being offered over cable, satellite and terrestrial systems."[11]

Even some of the proponents of regulation acknowledge that it is wrong to view cable facilities as essential to the development and provision of ITV services – although, as we discuss later, this completely undermines their case for regulation. For example, the Association of Local Television Stations, Inc. ("ALTV") notes that "[n]otwithstanding the current advantage of the cable platform for the delivery of ITV services, communications technology is evolving too

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7 *See* AT&T at 23-26. *See also* AOL Time Warner at 9-14.

8 SBC/BellSouth at 8, *quoting AT&T/MediaOne Order*, 15 FCC Rcd at 9866, ¶ 116.

9 DIRECTV at 3.

10 Canal+ at 1.

11 *Id.* at 14.

rapidly to justify the exclusion of other delivery platforms."[12] Similarly, Consumers Union, *et al.* urge the Commission to adopt rules regulating ITV services "on *all* platforms, whether cable, DBS, DTV, or new technologies yet unknown," noting that "[w]hile the *NOI* is probably correct that cable currently enjoys a 'first mover' advantage, this does not justify the utterly cable-centric view taken in the rest of the *NOI*."[13]

These parties suggest that, even in the absence of an "essential facility," it somehow promotes competition to impose common-carrier type nondiscrimination requirements on *all* facilities-based providers of ITV services. Thus, according to Consumers Union, *et al.*, "a general nondiscrimination provision which prevents *any* delivery system from interfering with the ITV services of a programmer, will provide for robust competition and diversity of content."[14] And, in ALTV's view, it is important to apply nondiscrimination rules to all competing MVPDs, because each "may have significant market power with respect to ITV *within their own customer base*" and "can act as effective information 'gatekeepers' *to those who subscribe to its multichannel service.*"[15]

This is nonsensical and ignores the well-established consensus of economists and antitrust authorities that, except in the rare circumstances that may justify application of the "essential facilities" doctrine, forcing competing companies to deal with all suppliers on a nondiscriminatory basis may protect certain *competitors* but does not promote consumers' interest in *competition*.[16] Competing facilities-based providers have an interest in attracting and retaining customers both by

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[12] ALTV at 12.

[13] Consumers Union at 1 (emphasis in original.)

[14] *Id.* at 12 (emphasis added).

[15] ALTV at 12 (emphasis added).

investing in unique, attractive services that may not be available to other providers and by carrying generally available services that are most attractive to customers. It makes no sense to say that each competing provider has market power and acts as a gatekeeper vis-à-vis its own customers – precisely because those customers are free to switch to another provider.

As we showed in our initial comments, there would be no reason to expect anticompetitive conduct and no basis for imposing a regulatory structure on ITV services even if cable facilities *were* essential to the provision of such services.[17] But there is no basis for even thinking about whether to impose nondiscrimination requirements on non-essential, competing facilities-based providers. If cable facilities are not essential facilities – and the record makes clear that they are not – then that is reason enough to terminate this inquiry.

B. There Is No Reason To Expect Vertically-Integrated Facilities-Based Providers of ITV Services To Engage in Anticompetitive Discrimination Against Unaffiliated Services

The proponents of regulation simply assert, as if it were an obvious truism, that facilities-based providers of ITV services – and cable operators, in particular – have inherent incentives to discriminate against unaffiliated ITV providers in an anticompetitive manner. They provide not a whit of evidence that any such discrimination has actually occurred. Nor do they provide any sound economic analysis – or any economic analysis at all – to support their suggestion that anticompetitive conduct will occur.

In contrast, NCTA submitted two analyses that explained in detail why there is no reason to expect cable operators to favor their affiliated ITV services over unaffiliated services unless it were more efficient – and more attractive to customers – for them to do so. What Harvard Law

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[16] *See* E. Elhauge, "Analysis Regarding NCTA Notice of Inquiry on ITV Services," Attachment A to NCTA Comments, at 17.

School Professor Einer Elhauge showed, for example, was that even a monopolist "generally has incentives to replace competition in downstream (or upstream) markets with self-provision *only* when self-provision is more efficient and better for consumers."[18] And as the paper of Marius Schwartz, Professor of Economics at Georgetown University, and Dr. John Gale of the Brattle Group explained,

> One cannot presume that even an input monopolist would necessarily have strong incentives to significantly disfavor rivals of its downstream affiliate: those retail-market rivals are also its customers for access services, so handicapping them entails a loss of profitable access sales. To the extent that independents may be more efficient than the monopolist's affiliate or provide valuable variety to consumers, discriminating against them will cause a significant reduction in the monopolist's access business, and therefore may prove unprofitable.[19]

None of the proponents of regulation show any awareness of these economic realities in this proceeding – although they have recognized and relied on them elsewhere. The major proponents (such as Disney et al.) are, after all, vertically (and horizontally) integrated media conglomerates themselves, who have frequently had to deal with charges that *they* might have incentives to discriminate against unaffiliated companies.[20] These companies own one or more major broadcast networks, major motion picture studios, over a dozen major cable programming networks, and a large number of radio and broadcast television stations. If the assertions in their comments in this proceeding were true, it would be reasonable to expect their studios, for example, to discriminate in an anticompetitive manner against unaffiliated broadcast and cable

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[17] *See* NCTA at 34.

[18] Elhauge, *supra*, at 31.

[19] M. Schwartz and J. Gale, "The Appropriateness of Nondiscriminatory Access Regulation for Interactive Television," Attachment B to NCTA at 2.

[20] S*ee* "A Tale of Two Cities: VOD Is Well Received in Honolulu and Columbus, Ohio," *Multichannel News*, Mar. 19, 2001, p. 9A ("At present . . . The Walt Disney Company's Buena Vista Television [isn't] making titles available to [video-on-demand] distributors.")

programming networks and, conversely, for their networks unfairly to favor programming produced by their own studios.

When faced with such accusations in a regulatory context, Disney et al. have repeatedly denied that they have any *anticompetitive* incentives to discriminate against unaffiliated competitors. For example,

> Disney President and Chief Executive Officer Michael Eisner assured other programmers and networks that ABC will not receive exclusive preference for Disney productions. "It would not make sense for us to force programming onto the schedule that in any way reduces the size of our audience," he said in comments to the trade press. "We are not looking to dominate ABC's prime time schedule."[21]

As one academic observer has pointed out, there are especially good reasons why allegations of anticompetitive discrimination by vertically integrated *content providers* ought to be taken with a grain of salt:

> I would hypothesize that the nature of entertainment production insures that foreclosure of unaffiliated producers due to vertical integration of production and distribution facilities will be minor. . . . Unlike widgets, entertainment products . . . are unique and, in advance of their production, have notoriously uncertain demand and probably, to some degree, uncertain demographic appeal. It is thus very difficult for the owner of a distribution facility, such as a television network, to predict in advance the source of products that will be most appropriate for exhibition on that network. Complete vertical integration is thus impossible to achieve, inherently leaving open opportunities for independent suppliers. As expressed by one television executive: "You can't consolidate creativity."[22]

ITV services have these same characteristics. They are, like other content-based media services, "unique" and "have notoriously uncertain demand." Indeed, with respect to nascent and untested ITV services, it is *especially* difficult for facilities-based providers like cable operators, DBS companies, broadcasters and others to predict in advance which services will be most

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[21] *Multinational Monitor*, Vol. 16, No. 9, September 1995 (www.essential.org/monitor/hyper/mm0995.03.html).

[22] D. Waterman, "CBS-Viacom and the Effects of Media Mergers: An Economic Perspective," 52 *Federal Communications Bar Journal* 531, 539 (2000).

attractive and appropriate for carriage – and, therefore, especially unlikely that such providers would sacrifice efficiency and customer satisfaction in order to boost their affiliated ITV services.

Disney et al. and the other broadcast companies and organizations that urge regulation in this proceeding understand these truths – with respect to *their* vertically integrated services. But as proponents in this proceeding, they jettison consistency and logic, tantalized by an opportunity to obtain additional leverage and competitive advantage through regulation.

Broadcasters already have asked for and received a "heads-I-win, tails-you-lose" choice of must-carry or retransmission consent with respect to carriage on cable systems. Those who choose retransmission consent (as virtually all of Disney's stations do) because of the attractiveness of their broadcast programming have the opportunity to negotiate for carriage of ITV programming and/or use of cable's limited upstream capacity in return for such consent – just as they can (and do) negotiate for carriage of their affiliated cable program networks or their digital broadcast programming. But why negotiate (and why worry about needing to provide a superior service) if the government will guarantee carriage and use of upstream capacity on favorable terms and conditions?

C. This Proceeding Has Nothing To Do with the "Openness of the Internet" – and Everything To Do With Gaining an Artificial Regulatory Advantage in Marketplace Negotiations

Some commenting parties – in particular, Disney, et al. – argue that it is necessary to intervene with regulation while ITV is still in its infancy in order to preserve the openness of the Internet. They describe ITV as the "convergence of television and the Internet."[23] And, recycling the same discredited rhetoric that they have used in arguing that cable operators who have invested in high-speed broadband facilities should be required to make those facilities available to

all Internet service providers, they warn that "the shift to broadband . . . threatens to end the openness that caused the Internet to thrive in the first place."[24]

But, as NCTA and others with a grip on the fundamental dynamics operating in the ITV area showed in their initial comments, most ITV services currently provided or contemplated by cable systems – such as video on demand, personal video recorders, and enhanced television – have little or nothing to do with the Internet.[25] And even those services that offer cable customers access to the Internet over their television sets are unlikely to displace the use of computers by those same customers to gain full, high-speed access to everything that is available on the World Wide Web and the Internet.

Indeed, the services for which the broadcast networks and organizations want access to cable systems' return path are not Internet access services at all. Thus, Disney et al. argue that

> if a vertically integrated broadband services distributor [*i.e.*, cable operator] allows its customers to participate in an interactive poll on CNN, it should allow customers to participate in interactive polls provided by ABC. Similarly, if a vertically integrated broadband services distributor carries an interactive advertisement for one network asking if the consumer wants to test-drive an automobile, it should allow it to work for all networks.[26]

This isn't "Internet access" for cable customers. It is simply access, via the cable system's limited upstream capacity, to the *network's* proprietary material, which may or may not be located on the Internet. Only those shopping opportunities or other interactive enhancements that ABC (and other networks and services carried by the cable system) choose to provide are available to viewers in this manner.

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[23] Disney, et al. at 6.

[24] *Id*. at 7.

[25] *See* NCTA at 8.

[26] Disney et al. at 18.

Like other terms and conditions surrounding the carriage of program networks, carriage of ITV downstream enhancements and the availability of upstream capacity can and should be *negotiated*, not imposed by the government. One would expect the terms and conditions to vary depending upon, among other factors, the network's costs and efficiency of providing the ITV services, the extent to which the services are expected to enhance the network's revenues, the attractiveness of the ITV services to the cable operator's customers, the extent to which upstream capacity is available, and the demand for such capacity by competing networks and by other ITV uses.

The terms and conditions for carriage of a basic programming network, a premium movie channel and a shopping network vary because of the differences in the underlying economics. Indeed, some services cannot economically be carried at all.[27] There is every reason to expect the terms and conditions for the transmission of programmers' ITV content to vary similarly in marketplace negotiations.

As discussed above, there is no reason to believe, especially at this early stage of ITV development, that such marketplace negotiations will be frustrated by anticompetitive discrimination by cable operators against unaffiliated networks. There certainly is no evidence that such networks have been deterred from developing and deploying interactive services. To the contrary, as Disney, et al. point out in their own comments, the development of Advanced Television Enhancement Forum ("ATVEF") standards has "led certain cable and broadcast

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[27] For every type of service that has established itself as a cable offering, there is another that has been unable to make the economics work. With respect to pay-per-view services, for example, some economic models have worked while others have not. *See, e.g.*, Brenner, Price & Meyerson, *Cable Television and Other Nonbroadcast Video*, § 17.02[2]. Similarly, the Sega Channel's model for providing video games over cable television systems proved not to be viable, given the technology and economics of cable between 1994 (when it launched) and 1997 (when it ceased operations as a cable service). *See* "Video Saves an Audio Star," *Cablevision*, Apr. 24, 2000.

networks to start integrating interactivity into some of their programming and advertising. . . . The Weather Channel, MTV, CNN, CNBC, NBC, ESPN and others have already deployed many other ITV programs."[28] And other unaffiliated ITV providers, such as Wink and Gemstar, are successfully negotiating agreements with cable operators.[29]

The broadcasters – and, in particular, the vertically integrated broadcast networks urging regulation in this proceeding – already have significant leverage in marketplace negotiations with cable operators. This is due, in part, to the attractiveness to viewers of some of their broadcast and cable programming. But their leverage has also been enhanced by government largesse, in the form of billions of dollars worth of free spectrum to reach over-the-air viewers, and the win-win alternatives of must-carry and retransmission consent to maximize their leverage vis-à-vis cable operators.

The additional regulatory intervention that they seek in this proceeding would be wholly unnecessary and unwarranted even if its only adverse consequences were to give the broadcasters an unfair advantage in the marketplace. But, as the record shows – and as we now discuss – the effects of regulating ITV services in their nascency are much worse.

II. REGULATION WILL DETER ITV INNOVATION, INVESTMENT AND DEPLOYMENT

In our initial comments, we showed why it would be especially counter-productive and contrary to the public interest to intervene and impose a regulatory framework on the provision of ITV before facilities are deployed, and before ITV services are even invented, much less tested in

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[28] Disney, et al. at 4.

[29] *See, e.g.*, "Gemstar-TV Guide and Charter Communications Announce Long-Term Interactive Program Guide Agreement," Gemstar-TV Guide Press Release, Feb. 16, 2001; "Gemstar-TV Guide International and Comcast Cable Announce 20-Year IPG Agreement," Gemstar-TV Guide Press Release, Mar. 23, 2001. Wink has entered into agreements with AOL Time Warner, Charter, Cox, Comcast, AT&T, Insight and Adelphia. *See* http://www.wink.com/contents/partners2.shtml#cable.

the marketplace. Such regulation is likely to deter investment by cable operators and others in the facilities needed to provide ITV services. And it's likely to deter investment by cable operators in ITV service providers – which, in light of the nascent state of ITV services and the precarious state of many ITV providers, would severely curtail development and deployment of such services. The comments of others – especially budding ITV service providers such as OpenTV and Canal+ – confirm these fears. The comments of the proponents of regulation, to the extent that they address them at all, simply wish the problems away.[30]

A. Regulation Would Deter Deployment of Facilities by Cable Operators and Other Facilities-Based Competitors

We showed in our initial comments that nondiscrimination requirements would undermine incentives by cable operators to deploy ITV services and facilities.[31] But, as comments of others demonstrate, such requirements would also deter deployment of broadband facilities by others. As discussed above, there is no basis for the notion that cable facilities are and will be the only suitable facilities for the provision of ITV services. But the one thing that can transform this myth into a self-fulfilling prophecy is a "nondiscrimination" requirement of the sort that is urged by the proponents of ITV regulation.

In this regard, the comments of OpenTV are particularly instructive. In OpenTV's view, the best way to promote and maximize development of ITV is to promote and maximize investment in and deployment of the bandwidth necessary for the provision of such services. While OpenTV believes that cable's currently available broadband facilities may give cable some short-term technical superiority in making bandwidth available for ITV, bandwidth "is a fungible

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[30] *See, e.g.*, NAB at 8-9.

and very reproducible commodity."[32] To the extent that cable's initial deployment of high-speed facilities and bandwidth fosters services that create a marketplace demand for *more* bandwidth, this is likely to promote even more facilities-based competition: "The superiority of any one product – in this case, cable as a medium for broadband – is what spurs investment and innovation designed to topple it."[33]

Indeed, cable's deployment of broadband facilities and provision of high-speed Internet service had precisely this effect on competitive facilities-based providers. Chairman Powell has pointed out that

> [d]igital subscriber line, the broadband technology telephone carriers have chosen, had been around for a long time. But for some reason, it had not been deployed. . . . It is now being deployed with a vengeance . . . out of fear of losing to the competitive alternative.[34]

But imposing nondiscrimination requirements on cable facilities for the ostensible purpose of ensuring access to the "superior" cable plant can squelch these competitive incentives to deploy additional, alternative facilities. As OpenTV concludes,

> If the builders of new bandwidth infrastructure such as DSL, satellite, and fixed wireless must wonder whether the current advantages of the cable plant will be ameliorated by regulation, they must wonder, too, whether the success of their efforts and anticipated profits will be "ameliorated" as well. In short, uncertainty in regulation throws the profitability of investment in new broadband innovations into doubt.[35]

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[31] *See also* L. Darby, "Bruised Economy Needs Boost from Policy-makers," *TR's Last-Mile Telecom Report*, Apr. 23, 2001 ("A large black regulatory cloud hovers over that industry as the FCC has yet to take off the table the prospect of imposing significant, telco-like access requirements on cable TV systems").

[32] OpenTV at 11 (emphasis added).

[33] *Id.* at 12.

[34] "FCC Chief: Deregulation Will Grease Competition," *Internet Week*, Feb. 7, 2001, (http://www.internetweek.com/story/INW20010207S0001).

[35] *Id.* at 13.

Moreover, a nondiscrimination requirement will diminish incentives of providers of ITV *services* to integrate into or invest in the deployment of facilities to increase available bandwidth. A guarantee of access to cable facilities on regulated terms and conditions will no doubt seem more attractive than the risks and costs of investing in new facilities. But, ultimately, consumers would be the victims of the diminished availability of bandwidth both on cable systems and on competitive facilities.

B. Regulation Would Deter Investment in ITV Services

As the comments – and the stock market – confirm, it is not only investment in *facilities* that is threatened by the prospect of regulation. In addition, potential facilities-based providers of ITV will be deterred from investing in the development of ITV *services*.

In their paper attached to NCTA's initial comments, Professor Schwartz and Dr. Gale indicated why, as a matter of economics, imposing nondiscrimination regulation on the nascent ITV business would be likely to deter investment by cable operators in ITV services:

> At this early stage in ITV market development, it remains largely unknown which types of vertical relationships between ITV services providers and delivery platforms are most efficient. The creation of some content, delivery technology, and customer premises equipment may have to be very closely coordinated and require vertical integration, while other services may be efficiently provided through vertical contracts. Regulation of vertical relationships in the ITV market— such as restricting certain vertical relationships (e.g., by requiring an integrated firm to behave as though it were not integrated)— may seriously raise transaction costs and limit the variety and quality of services available to consumers. This is especially likely when specialized equipment and services must be developed and provided to consumers simultaneously.[36]

The comments submitted by Cablevision Systems Corporation explain at length why, in providing new ITV services as part of their video programming service to customers, cable operators do, in fact, need to coordinate closely with ITV service providers and integrate the

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[36] Schwartz and Gale, *supra*, at 6.

services into their existing distribution technology on a unique case-by-case basis. One reason is the uncertainty that surrounds both the technology and the demand for ITV services: "Because of this uncertainty, content providers and other potential vendors of ITV services are cautiously exploring their development of content and services. With so much uncertainty, defining the relationships between platform and content providers will take time."[37]

Another reason is "the sheer quantity, diversity and complexity of network facilities, customer-premises hardware, software, applications and content that must be integrated in order . . . to furnish ITV services."[38] As Cablevision explains, "[c]lose coordination and integration of these multiple layers of network technology and content is essential to ensure that all ITV services and applications provided over Cablevision's network are compatible with all of the components of its platform."[39] In addition, "customer service and operational support activities are critically important in connection with the roll-out of ITV, given the sophisticated features and functionalities being offered to subscribers and the relative lack of experience with interactivity among a substantial segment of [the] subscriber base."[40]

For these and other reasons identified by Cablevision and other cable operators,[41] a standardized, arm's-length "one size fits all" approach to dealing with all potential providers of ITV services would be unworkable. And forcing cable operators to adopt such an approach if they were to invest in any particular ITV service would discourage all such investment. At this

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[37] Cablevision at 10.

[38] *Id.*

[39] *Id.* at 11.

[40] *Id.*

[41] *See, e.g.*, Comcast at 7; AOL Time Warner at 8 n.22; AT&T at 34.

stage of the game, shutting off the spigot on investment would be likely to have a devastating effect on ITV development.

As *Multichannel News* recently reported, **"**[t]he fate of most ITV players is tied to how quickly cable operators deploy digital set-tops, and how much MSOs are willing to spend on interactive television — a nascent industry with unproven business models."[42]

Time and money are of the essence because, as the Progress & Freedom Foundation notes, "the telecommunications and related high-tech sectors are under significant pressure in the financial markets."[43] And, as NCTA showed in its initial comments, many of the companies developing ITV services have been especially threatened by that pressure.[44]

According to the headlines, that pressure is only intensifying. Since this proceeding was launched, there has been "a drain in the capital markets, slow deployments and a stock-market slide."[45] And, as a result, "several ITV-centric companies are laying off employees, frantically looking for additional funding or partners or even facing the prospect of having to sell out altogether."[46]

Not all of the services being developed or on the drawing boards are likely to survive the test of the marketplace in any event. But the risks of developing new services and the difficulties of attracting investment capital should not be compounded by the threat of a wholly inappropriate

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[42] "Interactive Layoffs," *Multichannel News*, April 9, 2001, p.1.

[43] Progress & Freedom Foundation at 7.

[44] *See* NCTA at 36-38.

[45] "Interactive Layoffs," *supra.*

[46] "Layoffs Spread as Profits Trail Promise," *CableWorld*, April 9, 2001, p.29.

regulatory scheme. Given those risks and difficulties, as the Progress & Freedom Foundation states, "even the launching of regulatory inquiries can do more harm than good."[47]

III. THE FCC HAS LIMITED AUTHORITY TO REGULATE ITV REGARDLESS OF HOW IT IS CLASSIFIED

In our initial comments, we demonstrated that the FCC's authority to regulate ITV is extremely limited.[48] We showed that ITV services and markets are too nascent and inchoate to be defined, let alone classified for regulatory purposes. Nevertheless, to be responsive to the Commission's *Notice*, we explained that it appeared likely that cable-provided ITV services will be "cable services," a conclusion that was echoed in the initial comments of several parties.[49] We then showed that, as a cable service, cable-provided ITV service cannot be subject to the nondiscrimination requirements proposed in the *Notice*.[50]

Curiously, comments filed by most of the parties favoring some sort of regulation of cable-provided ITV give the issue of the appropriate regulatory classification of ITV services short shrift,[51] while some do not even address the issue at all, although they are quick to suggest that the Commission impose regulations on cable-provided ITV.[52] Some are confident that ITV can be placed in a particular regulatory box, or that existing laws may be applied to cable-provided ITV services, without explaining how the limitations and precedents accompanying those

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47 Progress & Freedom Foundation at 2.

48 NCTA at 39 –48.

49 *See, e.g.*, AT&T at 34-39; Comcast at 14-15; Charter at 12-13. *See also* Disney at 24-26 ("ITV arguably falls within Title VI in light of definition of 'cable service'…."). Earthlink at 8-10 ("video stream" is cable service); NAB at 14-15 (reliance on Sections 628(b) and 616 as "guide" to regulation suggests NAB views ITV service as cable service); ALTV at 17-18 (same citing Section 616).

50 NCTA at 45-48.

51 *See e.g.*, NAB at 14-15; CU et. al. at 8-10; ALTV at 16-17; MSTV at 9-11.

52 *See e.g.*, Gemstar; Echostar; TiVo.

particular classifications or laws impact on the FCC's ability to impose the nondiscrimination requirement they demand.[53]

Finally there are those proponents of regulation who take a Chinese menu approach to the FCC's authority over cable-provided ITV: Picking one item from regulatory column A (cable service), one from regulatory column B (information service) and one from regulatory column C (telecommunications service)[54] – and, for dessert, one wild card choice (Sections 1, 2, or 304 of the Communications Act), apparently hoping that one or another of these options will strike the Commission's fancy as a reason to impose a nondiscrimination requirement on cable-provided ITV services.[55]

None of these approaches to regulation of cable-provided ITV services will withstand scrutiny. Indeed, the fact that the proponents of regulation cannot even agree among themselves on a single regulatory classification for cable-provided ITV services demonstrates the absurdity of trying to classify a service still in its nascent stages. Below, we briefly address arguments that cable-provided ITV services cannot be "cable services" and then we explain that, whether cable-provided ITV services are cable services, information services or have a telecommunications component, they cannot be made subject to the type of nondiscrimination requirements advanced by the proponents of ITV regulation.

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[53] *See e.g.*, MSTV at 9-11; ALTV at 17-18; NAB at 14-15; CU et al. at 9-10; CERC at 2-3.

[54] Earthlink at 7 (Combining ITV building "blocks into a single bundled service provided as 'interactive television service' to subscribers results in a hybrid service subject to regulation under multiple titles of the Communications Act"); CU et al. at 8-10 (ITV would be subject to regulation if it is information service, telecommunications service or cable service); SBC/Bell South at 4-10 (ITV is information service with telecommunications component permitting regulation of dominant provider as a common carrier); Disney et al. at 21-26 (ITV platform could be telecommunications, ITV service and content could be information service *or* cable-provided ITV could be cable service).

[55] MSTV at 9-10 (Sections 1 and 2); CERC at 2-3 (Section 304).

A. Cable-Provided ITV Services Are Likely to be Cable Services

Our initial comments explained why it appeared likely that cable-provided ITV services would be deemed "cable services" for regulatory purposes and why, if that were the case, nondiscrimination requirements could not be imposed on providers of such services.[56] In addition, as we discussed in our initial comments and as the Commission recognized in the *Notice*, in amending the definition of "cable service" in 1996, Congress explicitly expanded the "cable services" definition to include "interactive services."[57] There could be no plainer statement that interactive services, at least when provided over cable, can be "cable services."

Only one set of comments affirmatively argues that cable-provided ITV services are not cable services,[58] although others, in contending that ITV services fit into some other regulatory category, implicitly reject the position that they are cable services.

SBC/BellSouth assert that ITV services cannot be "cable services" because they do not involve the transmission to (1) "subscribers" of (2) "video programming" or "other programming services."[59] First, SBC/BellSouth argue that, since the Commission's Rules define a "subscriber" as a "member of the general public who receives broadcast programming *distributed by a cable television system*," and since some consumers receive ITV service over "platforms" other than cable such as DBS, then the service cannot be a "cable service" since it is not always offered to a "subscriber," as defined in the Commission's Rules.[60]

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[56] NCTA at 41-48.

[57] *Id.* at 43 *citing* H.R. Rep. 104-458 at 169; *Notice* at ¶45.

[58] SBC/BellSouth at 10-13.

[59] *Id.*

[60] *Id.* at 10 (emphasis in original), *citing* 47 C.F.R. §76.5(ee).

To repeat the argument is to refute it. It rests at bottom on the SBC/BellSouth conclusion that "Congress could not have intended that the regulatory classification of ITV service vary depending on whether the consumer receives video service over cable or DBS."[61] The simple fact is that the regulatory classification of video and other services *does* often vary depending upon how they are distributed. Video programming is delivered over cable, DBS, MMDS and broadcast television – all of which are regulated under different regimes. It would not be unusual to have cable-delivered ITV services governed by one regulatory regime and similar services delivered over DBS or DSL lines, for example, governed by another.

The second SBC/BellSouth point – that ITV services are neither "video programming" nor "other programming service" – is also without merit. First, of course, the difficulty in determining whether ITV services are "video programming," or "other programming services," or something else entirely plainly demonstrates the futility of trying to categorize this nacent service. Nevertheless, as we have discussed in our initial comments,[62] many contemplated cable-provided ITV services have components comparable to programming provided by a television broadcast station, and thus such components may constitute "video programming" as defined by the Act.

SBC/BellSouth argue that ITV service is not "video programming" because it is "typically 'supplementary' to the video programming, [so] it therefore cannot be considered part of the same programming."[63] Contrary to SBC's suggestion, the cable service definition expressly includes services that combine video programming elements and "subscriber interaction …

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[61] Id.

[62] NCTA at 41-43.

[63] SBC/BellSouth at 11.

required for the selection or use of such video programming…." As even Disney et al. recognize, "ITV arguably falls within Title VI in light of the definition of 'cable service'…. The Commission could find that ITV enhancements constitute subscriber interaction required for the selection of video or other programming . . .."[64]

In any event, current and contemplated ITV services certainly fall within the definition of "other programming service" since they combine content with a connection to the Internet or other source, for delivery over the cable plant and afford subscribers access to "information" that is "available to all subscribers generally."[65] But SBC/BellSouth contend that ITV services cannot be "other programming" services because they are not available to all subscribers generally and that "[t]he very point of ITV service is to provide consumers with information that is *different* from that which is 'available to all subscribers generally.'"[66] In support of this claim, SBC/BellSouth quote the statement in the *Notice* (at ¶6) that ITV service involves "subscriber-initiated" choices. This argument too misses the mark.

First, ITV services could constitute cable services to the extent they are video programming plus interactivity, in which case the "available to all subscribers generally" test in the "other programming service" definition is not even implicated. In any event, cable-provided ITV services *will* be "made available generally to all subscribers" within the meaning of the Cable Act.[67]

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[64] Disney et al. at 24.

[65] 47 U.S.C. §522(14).

[66] SBC/BellSouth at 11(emphasis in original)

[67] *See* 47 U.S.C. §522(14) (defining "other programming service").

In considering whether a cable service is available to all subscribers, the fundamental question is not whether each subscriber chooses to take advantage of the availability of the service. It is also irrelevant that not all customers who will receive such services receive the same information at the same time. Rather, the question is whether the services are "made available" to customers so they may take advantage of such services if they so choose. It seems beyond dispute that the contemplated ITV services that will be provided by cable operators meet that criterion. For these reasons, because cable-provided ITV services will constitute "video programming" and/or "other programming services," the SBC/BellSouth argument that cable-provided ITV services are not cable services is without merit.

B. If Cable-Provided ITV Services are Cable Services, the Commission Has No Authority to Impose the Proposed Nondiscrimination Requirements on Cable Operators

1. Sections 621(c) and 624(f) of the Communications Act Bar Imposition of Nondiscrimination Requirements on Cable-Provided ITV

A number of the proponents of regulation conclude that cable-provided ITV services are cable services, but they ignore the limitations that Title VI imposes on application of the nondiscrimination requirements they seek. We have addressed those limitations in our initial comments and need not dwell on them at length here. Suffice it to say, however, that, assuming cable-provided ITV service is a cable service, the Commission is barred by Sections 621(c) and 624(f) of the Communications Act, 47 U.S.C. §531(c), 544(f), from imposing nondiscrimination requirements on a cable operator.

Section 621(c) prohibits the imposition of common carrier or utility regulation on cable operators. And, as we and others demonstrated in initial comments,[68] and as we show below, a nondiscrimination requirement is the essence of common carrier or utility regulation.

An entity is considered a common carrier if it is required to hold itself out indifferently even to a *segment* of the public.[69] The United States Supreme Court has held that requirements that cable operators provide access to "broad categories of users" by holding out dedicated channels on a first-come, first-served nondiscriminatory basis "plainly impose common-carrier obligations on cable operators."[70] The legislative history of Section 621(c) makes clear that Congress intended to preclude the imposition on a cable operator of "the traditional common carrier requirement of servicing all customers indifferently upon request . . .."[71] The Senate version of the bill that ultimately became the 1996 Act specifically was amended to make clear that cable operators are not engaged in the provision of "telecommunications service" to the extent they provide cable services.[72]

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68 NCTA at 45-49. *See also* Comcast at 14-16; Charter at 9-10; AT&T at 34-38.

69 *See NARUC v. FCC*, 525 F. 2d 630, 641 (D.C. Cir 1976); *Terminal Taxicab v. Kurtz*, 241 U.S. 252 (1916) (finding that a firm is a common carrier if it is required indiscriminately to provide service to a subset of the public). Congress has likewise provided expressly that the offering of telecommunications to "such classes of users as to be effectively available directly to the public" is a common carrier service. 47 U.S.C. §§ 153(46), (44).

70 *FCC v. Midwest Video Corp.*, 440 U.S. 689, 699-702 (1971).

71 H.R. Rep. No. 98-394 at 60 (1984)("1984 House Report").

72 *See Federal-State Joint Board on Universal Service*, 13 FCC Rcd a11501, 11523 ¶44(1998) ("*Universal Service Report to Congress*")(explaining that the reference to cable service was deleted from the Senate definition of "telecommunications services" so courts would not interpret the term "too broadly and inappropriately classify cable systems . . . as telecommunications carriers."). As Senator Pressler, Chairman of the Senate Commerce Committee at the time, explained, the change was "intended to clarify that carriers of broadcast or cable services are not intended to be classed as common carriers under the Communications Act to the extent that they provide broadcast or cable services." 141 Cong. Rec. S7996 (June 8, 1995) (statement of Sen. Pressler). This change was carried forward to the enacted statute.

Congress has resolved arguments for different access requirements by establishing several very limited exceptions to this general rule, to address very specific problems it has identified. The result is that the Cable Act generally preserves cable operator control over the programming carried on its system, except in three limited areas: access to channels for "public, educational, and governmental" use;[73] access to a statutorily limited number of channels for commercial use (so-called "leased access" channels);[74] and the reservation of channels for the carriage of over-the-air broadcast signals.[75]

The FCC and the Courts have consistently rejected efforts to expand access to cable systems, in the absence of specific Congressional authorization.[76] The FCC has affirmed the limitation Congress placed on access requirements. For example, in the *AT&T/TCI Merger Order*, in rejecting calls for the imposition of forced access requirements, the Commission stated that it "continue[s] to recognize and adhere to the distinctions Congress drew between cable and common carrier regulation."[77]

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[73] 47 U.S.C. §531.

[74] *See id.* §532.

[75] *See id.* §534. Other "access" obligations imposed on cable operators are also the result of specific statutory enactments narrowly tailored to address specific government interests that were identified through the legislative process. *See, e.g., id.* §§ 624(i) (access to in-home cable wiring); 628 (access to satellite cable programming).

[76] The FCC and the Courts have based their decisions on Congress' effort throughout the Communications Act to preserve the First Amendment editorial discretion of cable operators, and impose only those discrete intrusions upon that discretion that it deemed absolutely necessary. *See Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (citing *Leathers v. Medlock*, 499 U.S. 439, 444 (1991)); *National Cable Tel. Ass'n v. FCC*, 33 F.3d 66, 75 (D.C. Cir. 1994) (comparing providers of video dialtone, a common carriage service, to cable operators, who "exercise a significant amount of editorial discretion regarding what their programming will include").

[77] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee*, 14 FCC Rcd 3160, 3176 ¶ 29 (1999) ("*AT&T/TCI Merger Order*").

Further, Congress prohibited not only imposing common carrier regulation on cable systems, but also subjecting cable systems to utility regulation. In so doing, Congress intended to prevent not only regulation that converted cable operators into common carriers, but also other regulatory actions that treated cable operators *like* common carriers or utilities. Treating a cable system as an "essential facility"[78] by imposing access regulations on it is the essence of common carrier-like utility regulation. For these reasons, Section 621(c) would prohibit imposition of nondiscrimination requirements on cable operator provision of ITV services, assuming they are cable services.

In a similar vein, Section 624(f) prohibits the FCC from "impos[ing] requirements regarding the provision or content of cable services *except as expressly provided in [the Communications Act.*]"[79] Commissioner Furchtgott-Roth dissented from adoption of the *Notice* on the ground that Section 624(f) arguably prohibits the FCC from even commencing a proceeding on the subject.[80] That caution is well-taken. The proposed nondiscrimination rules would require cable operators who choose to provide ITV services also to provide such services to unaffiliated ITV providers, thus requiring both the provision of ITV services as well as the content of such services. Section 624(f) plainly would prohibit the Commission from requiring

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[78] Utility regulation is premised on the notion that the denied facility is "essential" in the sense that lack of access to it would eliminate all rivals in the downstream market. *See Alaska Airlines v. United Airlines*, 948 F.2d 536, 544 (9th Cir.1991) ("A facility that is controlled by a single firm will be considered 'essential' only if control of the facility carries with it the power to eliminate competition in the downstream market."); *Twin Labs. v. Weider Health & Fitness*, 900 F.2d 566, 569 (2d Cir.1990) ("As the word 'essential' indicates, a plaintiff must show more than inconvenience, or even some economic loss; he must show that an alternative to the facility is not feasible."); *McKenzie v. Mercy Hosp.*, 854 F.2d 365, 370-71 (10th Cir.1988) (no claim if, after being denied essential facility, plaintiff is still able to compete). As demonstrated in our initial comments (at 32-36) and in the Commission's various reports on broadband deployment, cable is not an "essential facility" for the provision of broadband services like ITV.

[79] 47 U.S.C. §544(f)(emphasis added).

[80] *Notice*, Dissenting Statement of Commissioner Harold W. Furchtgott-Roth, at 10.

provision or content of ITV services (assuming they are cable services) as is proposed by the proponents of a nondiscrimination regulatory regime.

2. No Provision of the Communications Act Supports Regulation of Cable-Provided ITV Services

Some commenters argue that – assuming ITV services are classified as cable services – other provisions of Title VI explicitly provide for the type of nondiscrimination requirements they seek. Most cite either Section 616 or Section 628 of the Act, although some throw in Sections 613 and Section 653 for good measure.[81] Most are understandably vague about claiming paternity for the argument that these provisions *expressly* justify application of the proposed nondiscrimination requirement to cable, because they do not.

For example, in its one-paragraph discussion of FCC authority, NAB argues that "existing statutory and rule provisions could readily be utilized as the *general regulatory template* for nondiscrimination provisions applicable to ITV services,"[82] and that the Commission could "use[ ] Section 628 *as a model* … and could accordingly *be guided by these provisions* in considering how to formulate a nondiscrimination provision in the ITV context."[83] Echostar sings a similar song, claiming that the Commission could adopt "program-access type" rules "that *could be modeled on* the program access restrictions."[84] But none of these parties

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[81] *See* ALTV at 17-18 (§§616); NAB at 14-15 (§616, §628); Disney et al. at 26 (Commission could invoke provisions such as Sections 613, 616, and 653 "to create a framework" for nondiscriminatory access regulations.) Since no commenter has explained how or why Sections 613 or 653 would support the regulation of cable-provided ITV services, we will await such an explanation before we address the implicit claim that those sections somehow support imposition of nondiscriminatory access conditions on cable-provided ITV services.

[82] NAB at 14 (emphasis added).

[83] *Id*. at 14-15 (emphasis added).

[84] Echostar at 8 (emphasis added).

even claims that Section 628 itself applies to cable-provided ITV services, let alone offers a legal rationale to support such a claim.

Not so timid is ALTV which asserts that "if the Commission determines that anti-discrimination regulation should be limited to program-related ITV, it may rely on Section 616 … as authority for the rules ALTV suggests."[85] ALTV's justification for that bold contention is limited to a single paragraph bereft of analysis and merely reciting the language of Section 616, the definition of "video programming," and concluding that "[t]he definition is clearly broad enough to include ITV services, particularly those provided by broadcasters such as ALTV's members."[86]

The short, best answer to these attempts to shoe-horn emerging ITV services into the existing cable regulation regime is it is too early to see if they will fit. While, if forced to choose, we believe cable-provided ITV services likely are cable services, given the diverse nature of those services, it is certainly premature to apply existing regulatory provisions to those services, particularly in light of the prohibitions in Section 621(c) and 624(f). Moreover, even if Section 616 or other cited provisions were applicable to cable-provided ITV services, they hardly give the Commission jurisdiction to impose the unbridled nondiscrimination requirements proposed in the *Notice* and advanced by some of the commenters.[87]

Congress enacted Section 616 to address some video programmers' claims that they could not gain access to the critical mass of customers necessary for survival without involuntarily

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85 ALTV at 17.

86 *Id.* at 17-18.

87 Earthlink, for one, apparently recognizes that there are "statutory limitations on [the Commission's] authority to regulate cable services," and, for that reason, argues that the "various building blocks of ITV service" may be governed by "multiple titles of the Act." Earthlink at 19.

relinquishing ownership rights. As the FCC has recognized, however, Section 616 does not foreclose "legitimate, aggressive negotiations" between cable operators and programmers[88] or bar cable operators from asking for and receiving exclusivity rights from programmers.[89] It also does not create a right of access to cable systems. To the contrary, sanctioning such a right would skew carriage negotiations and undermine the 1992 Cable Act's directive to "'rely on the marketplace, to the maximum extent feasible, to achieve greater availability' of relevant programming."[90]

Finally, MSTV claims that, "in its order approving the merger of AOL and Time Warner, the FCC determined that it has authority to regulate ITV services pursuant to Sections 521(4)[sic] and 157 nt [sic] of the Communications Act."[91] The Commission did no such thing. It merely stated, in the paragraph cited by MSTV, that "[t]wo objectives of the Communications Act *appear to be relevant* to the provision of ITV services," citing Section 601(4), 47 U.S.C. §521(4) (which states that one of the "purposes" of the cable provisions of the Act is to ensure "the widest possible diversity of information sources and services to the public") and Section 7, 47 U.S.C. §157 (making it the policy of the United States to encourage the provision of new technologies and services to the public) of the Act.[92]

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88 *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 2642, 2648 (1993).

89 Both Congress and the Commission have recognized the common use of exclusivity in carriage negotiations and have specifically declined to prohibit cable operators from asking for and receiving exclusivity rights or financial interests from programming vendors. *Id.*

90 *Id.* (quoting 1992 Cable Act at § 2(b)(2)).

91 MSTV at 9, 26.

92 *See In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, Memorandum Opinion and Order*, CS Docket No. 00-30 at ¶216 (released Jan. 22, 2001) ("*AOL TimeWarner Merger Approval Order*")(emphasis added).

Neither of these sections provide the FCC with substantive jurisdiction or regulatory authority to adopt the type of nondiscrimination requirements proposed in the *Notice*, and nothing in the *AOL-Time Warner Approval Order* suggests they do. Indeed, as the overwhelming record in this proceeding demonstrates, Commission *abstention* from regulation would serve the cited goals far better than would regulation of an emerging new service which has the potential of providing a wide diversity of information sources and services to the public.[93]

3. Even if Cable-Provided ITV Service Were an Information Service, the FCC Would Not Have Authority to Impose Nondiscrimination Requirements on Cable Operators

Some argue that cable-provided ITV services are, at least in part, information services.[94] An information service is defined by federal law as the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[95] Proponents of regulation of cable-provided ITV services argue that cable-provided ITV service is an information service at least in part, and, since information services are provided "via telecommunications," there is a telecommunications component of cable-provided ITV services that can be regulated under Title II of the Communications Act.[96] Alternatively, some argue that, as an information service, cable-provided ITV can be regulated under a Title I "ancillary jurisdiction" rationale.[97] Both arguments are well wide of the mark.

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[93] In any event, in the *AOL-Time Warner Approval Order*, the Commission was referring to Section 601(4) and Section 7 of the Act in the context of what it saw to be its responsibility to pass upon whether the particular merger before it would serve the "public interest." Even assuming those circumstances gave the FCC a jurisdictional hook on which to hang its ITV hat in light of the particular merger before it, Sections 601(4) and Section 7 cannot provide a basis for regulation in this case where rules of general applicability are at issue.

[94] SBC/BellSouth at 4-8; CU et al. at 9; Disney et al. at 22-23.

[95] 47 U.S.C. § 153(20).

[96] Earthlink at 12-15; SBC/Bell South at 4-8; Disney et al. at 22 (FCC could treat ITV service and content as information services).

[97] CU et al. at 9; MSTV at 9-10.

Assuming that cable-provided ITV services are information services, the FCC has found that, like cable services, "information services" are in a separate regulatory category from telecommunications services,[98] and thus, that providers of information services are not subject to regulation as common carriers. That policy is consistent with the FCC policy of abstaining from any regulation of the Internet.[99] The decision not to regulate information services dates back more than 30 years. The Commission determined in the *First Computer Inquiry* that it would not subject data processing to common carrier regulation because the "computer service industry is one characterized by open competition and relatively free entry."[100] Even then, what regulation was imposed was limited to common carriers that provided data processing in order "to obviate foreseeable abuses."[101]

In the *Computer II* proceeding, the Commission adopted "a regulatory scheme that distinguishe[d] between the common carrier offering of basic transmission services and the offering of enhanced services."[102] In establishing this dichotomy, "the Commission sought to draw a bright line between activities that would be regulated as common carrier offerings and those that would not."[103] Reasoning that Congress intended the Commission to treat services within the reach of the Communications Act of 1934 according to substance not form, the

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98 *Universal Service Report to Congress*, 13 FCC Rcd at 11524 ¶¶ 45-46.

99 *See generally* JASON OXMAN, FEDERAL COMMUNICATIONS COMMISSION, THE UNREGULATION OF THE INTERNET, OPP Working Paper No. 31 (July 1999) (discussing the "FCC's contributions to the rapid expansion and success of the Internet").

100 *In the Matter of Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, Docket No. 16979, Final Decision and Order*, 28 FCC 2d 207, 270 (¶11) ("*First Computer Inquiry*"), *aff'd in part and rev'd in part, GTE Serv. Corp. v. FCC*, 474 F.2d 724 (2d. Cir. 1973).

101 *Id.*

102 *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision*, 77 FCC 2d 384, 387 (¶5)(1980)(*"Computer II").*

103 *California v. FCC*, 905 F.2d 1217, 1224 (9th Cir. 1990); *Computer II*, 77 FCC 2d at 428-435 (¶¶114-132).

Commission "appl[ied] traditional Title II regulatory mechanisms to basic services and app[ied] *no direct regulatory mechanism for enhanced services*."[104]

The 1996 Act did not explicitly adopt the Commission's basic/enhanced dichotomy, but instead uses the terms "telecommunications services"[105] and "information services."[106] However, the Commission has determined that "all of the services that the Commission has previously considered to be 'enhanced services' are 'information services'"[107] and are therefore not regulated under Title II of the Act. Since the Commission's decision in *Computer II*, the Commission has maintained a deregulatory policy toward providers of enhanced services to allow for the development of competitive markets for enhanced service offerings.

Merely because providers of information services use telecommunications, they do not become subject to the obligations of "telecommunications service" providers. In particular, information service providers have no obligation to offer telecommunications to third parties.[108] Rather, the Commission specifically has limited to common carriers the obligation to provide the telecommunications components of information service to other firms on the same rates, terms, and conditions.[109]

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[104] *Computer II*, 77 FCC 2d at 435 (¶131) (emphasis added).

[105] *See* 47 U.S.C. § 153(46) (defining "telecommunications service").

[106] *See* 47 U.S.C. § 153(20) (defining "information service").

[107] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 21955-56 (¶102) (subsequent history omitted).

[108] *See Computer II*, 77 FCC 2d at 428-435 (¶¶114-132).

[109] *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof; Communications Protocols under Section 64.702 of the Commission's Rules and Regulations*, 104 FCC 2d 958 (1986) (subsequent history omitted) ("*Computer III Phase I*").

Because the Commission "has never imposed a scheme of regulation over data processing,"[110] but rather has regulated the underlying basic (telecommunications) service used to offer data processing, imposing a nondiscrimination regime on ITV service providers (assuming ITV services are information services) would drastically depart from Commission precedent. The imposition of such access would force cable operators providing ITV services to enter into a new area of business and become telecommunications service providers, a business in which they were not previously engaged.

The Commission has recognized that "[a]ny regulation in this area must assess the merits … of extending regulation to an activity simply because a part of it is subject to the agency's jurisdiction where such regulation would not be necessary to protect or promote some overall statutory purpose."[111] The implementation of a nondiscrimination regime cannot be said to protect or promote some overall statutory purpose. Indeed, as we have shown, imposition of such a regime is contrary to the purposes of the 1996 Act[112] because the substantial cost of any such regulation may well have a crippling effect on the development and deployment of advanced services. Therefore, even if cable-provided ITV services were information services in whole or in part, there is no precedent for regulating such a nascent industry given the Commission's previous actions with respect to emerging information services.

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[110] *Computer II*, 77 FCC 2d at 435(¶132).

[111] *Id.*

[112] *See also,* 47 U.S.C. § 230(b)(2) ("It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation").

C. Assuming Cable-Provided ITV Services Are Information Services, The "Telecommunications" Component of such Services Would Not be Subject to Nondiscrimination Requirements

Contrary to the arguments of some proponents of ITV regulation,[113] even if cable-provided ITV services were information services, and thereby were deemed to be provided "via telecommunications," that does not mean that they – or any component thereof – are telecommunications services. As the Commission recently reaffirmed, "there is a clear distinction between 'telecommunications' and 'telecommunications services'. . .[I]nformation service providers as such are not providing 'telecommunications service' under the Act, and thus are not subject to common carrier regulation."[114]

A service is provided "via telecommunications" if information "of the user's choosing between points that the user specifies" is transmitted to customers by wire or radio.[115] In contrast, the Act defines a telecommunications *service* as offering telecommunications (the transmission without alteration of any information selected by the user) to the public, for a fee.[116] While information service providers interact with customers by making certain content available and facilitating its use, telecommunications service providers provide pure transmission facilities and services, with no accompanying content, which customers use to carry information of their choosing.[117]

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[113] Earthlink at 14-15. *See also* SBC/BellSouth at 4-8.

[114] *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, FCC 01-140, *Order on Remand*, released April 27, 2001, at ¶32.

[115] 47 U.S.C. § 153(43).

[116] *See id.* §§ 153(43) & (46).

[117] *See Non-Accounting Safeguards Remand Order* at ¶37("an information service essentially bundles with it a telecommunications component, making it impossible for an information service offered to a subscriber to qualify as a telecommunications service.")

The Commission has long recognized that when information service providers obtain telecommunications and use it to provide information services, telecommunications is merely a component of, or input to, information services, and such information service providers are not "offering" telecommunications services.[118] Indeed the Commission has determined that information service providers are not required to contribute to the universal service fund because they are not "telecommunications carriers."[119]

SBC/BellSouth assert that "where a Title I ITV service provider *self-provides* the transmission component of its service offering, it may *also* be subject to regulation as a common carrier under Title II.[120] But merely because information service providers use their own telecommunications facilities to provide their service, that does not mean that they are engaged in the provision of a telecommunications service, subjecting them to Title II common carrier regulation.

This idea can be traced to the Ninth Circuit's erroneous suggestion in the *Portland* case that cable modem service comprises two separate services offered to end users – a telecommunications service (transport over cable broadband facilities) and an information service (conventional Internet access).[121] The Ninth Circuit's opinion rested on the erroneous premise

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[118] *Computer II*, 77 FCC 2d 384, 428-435 (¶¶114-132) (1980). *See also Non-Accounting Safeguards Remand Order* at ¶36.

[119] *See Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9179-81 ¶¶ 788-790 (1997).

[120] SBC/BellSouth at 5(emphasis in original).

[121] *See AT&T v. City of Portland*, 216 F. 3d 871, 877-79 (9th Cir. 2000). In any event, the Ninth Circuit's discussion of this point was not a necessary element of its decision to invalidate Portland's ordinance. The court found the Portland ordinance unlawful because cable modem service is not a "cable service" subject to the regulatory oversight of local franchising authorities. As the Commission has observed, the court's determination that there is a separate transmission component of cable modem service that is a "telecommunications service" under the Act was an "unnecessary extra step." Amicus Curiae Brief of the Federal Communications Commission in *Henrico* at 20-22 ("FCC Amicus Brief"). Thus the court's holding on this point is dictum, and it does not bind the Commission. Indeed, the court itself stated that "Congress has

that services provided over "telecommunications facilities" are "telecommunications services," and that because cable operators arguably use telecommunications facilities to deliver cable modem service, cable modem service is a "telecommunications service." However, as Commission counsel has recognized, "not every use of telecommunications facilities necessarily involves the provision of a 'telecommunications service' under the Act's specialized definition of that term."[122]

This is because "telecommunications" and "telecommunications service" are not interchangeable terms. Federal law defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[123] "Telecommunications service," on the other hand, has a more limited definition, meaning only "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[124]

Cable operators who will be offering ITV services will not be telecommunications service providers even if the ITV services they offer are deemed to be information services. They will not be selling transport stripped of content to anyone. Rather, they will offer a cable, or at most, an information, service to customers, an integral part of which is its content and applications. As the

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reposed the details of telecommunications policy in the FCC," and it would not "impinge" on the Commission's authority in this area. *Portland*, 216 F.3d at 879-80.

[122] FCC Amicus Brief at 21.

[123] 47 U.S.C. §153(43).

[124] *Id.* §153(46).

district court in the *Broward County* case recognized in addressing cable modem service, such service is "a single integrated *programming* option."[125]

The same analysis applies to cable-provided ITV services – at least those services currently foreseeable. As discussed above, the fact that cable operators might provide ITV services via telecommunications facilities (if the service is deemed an information service) does not make such services telecommunications services. Rather, the wires used by the cable system are merely the means of delivering content and Internet or equivalent connectivity to cable customers, not any severable aspect of the service.[126]

The spuriousness of the claim that cable-provided ITV service is a telecommunications service and cable operators are telecommunications service providers manifests itself in the consequences of such a finding: it would be extremely difficult (and retrograde, given 25 years of regulatory reform) to apply obligations imposed on telecommunications carriers – for example, the general duty to serve all comers indifferently – to cable ITV service providers. If the Commission were to attempt to classify cable-provided ITV service as a telecommunications service, it would have to undertake numerous, lengthy, and complicated proceedings to determine how existing common carrier rules could be altered to harmonize with its decision. Indeed, the Commission itself in the *Henrico* case, when dealing with the closely related area of cable modem service, noted the "significant regulatory consequences" that arise out of a determination that

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[125] *Comcast Cablevision of Broward County, Inc. et al. v. Broward County, Florida*, No. 99-6934-Civ.-Middlebrooks, Order Granting Plaintiffs' Cross-Motions for Summary Judgment and Denying Defendant's Motion for Summary Judgment (S.D. Fla. Nov. 8, 2000) ("*Broward County*") slip op. at 9 (emphasis added).

[126] *See id.* at 9, 12 (rejecting idea that cable operators possess a "unique facility" that merits separation of the "transmission mechanism").

there is a "transmission component" of cable modem service that is a "telecommunications service."[127]

D. *Computer II's* "Unbundling Requirements" Are Inapplicable To Cable-Provided ITV Services

Contrary to the arguments of some who would impose regulation on cable-provided ITV services, the Commission may not take a "*Computer Inquiries* type approach"[128] to the regulation of such services, even if they are deemed to be information services. If anything, the *Computer Inquiry* proceedings reinforce the argument that cable-provided ITV services should not be regulated, because the legal and policy rationales behind their "unbundling requirements" cannot be applied to cable-provided ITV services.[129]

Although the Commission determined in *Computer II* that information services are not subject to Title II regulation, it was concerned that certain common carriers had both the opportunity and incentive to engage in cross-subsidization and anticompetitive behavior in offering both basic (telecommunications) and enhanced (information) services. The Commission noted that because the provision of enhanced services was dependent on access to a common carrier's basic service, enhanced service providers needed access to that basic service without being subject to discriminatory tactics.[130] So that "non-discriminatory access [could] be had to basic transmission services by all enhanced service providers," the Commission required all

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[127] FCC Amicus Brief at 21.

[128] Disney et al. at 22; *See also*, Earthlink at 3-4, 15; SBC/BellSouth at 5-7.

[129] What *Computer II* calls "unbundling" is in fact the separation of transmission and enhanced services that use transmission, rather than the unbundling of network elements required under *Computer III* and Section 251(c)(3) of the Act.

[130] *See Computer II*, 77 FCC 2d at 474-75 ¶ 231.

common carriers that offered enhanced services to unbundle their basic transmission offerings from their advanced service offerings.[131]

Since *Computer II*, the Commission has continued to impose these "unbundling requirements" on common carriers, but the Commission has never required entities that are not common carriers to separate content from conduit.

Further, in *Computer II*, the Commission specifically declined to separate a "communications component" of enhanced services from the data processing component, reasoning that "the Act should not control either the substance of enhanced service offerings to the public or the manner in which they are made available."[132] Indeed, if such separation were permissible, then *all* information service providers would be common carriers, because inherent in the nature of an enhanced or information service – whether provided over cable, DBS, MMDS or other facilities – is the *use* of telecommunications to provide the service.[133]

Imposition of *Computer II*'s "unbundling" requirements on cable-provided ITV services – particularly at this nascent stage of their development – would also be inconsistent with their purpose and rationale. In an effort to ensure a competitive landscape for the provision of enhanced (information) services, and in light of its belief that the best way to achieve this goal was

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[131] *Id.* ("those carriers that own common carrier transmission facilities and provide enhanced services, but are not subject to the separate subsidiary requirement, must acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariffs when their own facilities are utilized"). The Commission required certain dominant carriers, who had both the incentive and ability to discriminate on a national scale, to offer enhanced services through a separate subsidiary. *Id.* at 469-70 (¶¶222-224) (applying the separate subsidiary regime to AT&T and GTE).

[132] *Computer II*, 77 FCC 2d at 430 (¶120) ("We have described our repeated unsuccessful efforts to identify a discrete communications component … in what we have finally come to label 'enhanced service'"); *see also Universal Service Report to Congress*, 13 FCC Rcd at 11513-14 (¶27) ("The Commission therefore determined that enhanced services which are offered 'over common carrier transmission facilities,' were themselves not to be regulated under Title II of the Act, no matter how extensive their communications components").

[133] 47 U.S.C. § 153(20) (defining "information service"); *see also Computer II*, 77 FCC 2d at 435 (¶132).

through deregulatory means,[134] the Commission has construed *Computer II*'s "unbundling" requirements as narrowly as possible.

The Commission "restricted bundling of … enhanced services with telecommunications services out of a concern that carriers could use such bundling in anticompetitive ways."[135] The Commission felt that the necessary safeguards "should be directed at monopoly telephone companies exercising significant market power on a broad geographic basis."[136] There is no rationale for extending unbundling requirements outside of those circumstances. In fact, the Commission itself has recently eliminated bundling restrictions on common carriers' packaging of customer premises equipment and telecommunications services.[137]

Cable operators providing ITV services have no ability to cross-subsidize unregulated enhanced services with regulated monopoly basic transmission services.[138] They "lack the potential to cross-subsidize or to engage in anticompetitive conduct to any significant degree,"

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[134] *See Computer II*, 77 FCC 2d at 387 (¶7) ("we find that regulation of enhanced services is not required in furtherance of some overall statutory objective. In fact, the absence of traditional public utility regulation of enhanced services offers the greatest potential for efficient utilization and full exploitation of the interstate telecommunications network"); *Computer III Phase I*, 104 FCC 2d at 1001-02 (¶77) ("[w]e seek to maximize the public's ability to obtain efficient, low-cost telecommunications service, with emphasis in the proceeding on enhanced services," and "we believe that free and fair competition is the best way to achieve that goal").

[135] *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review -- Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, 13 FCC Rcd 21531, 21533 (¶2) (1998) ("*Enhanced Services Further Notice*"); *Computer II*, 77 FCC 2d at 474-75 (¶231) (discussing the unbundling requirements).

[136] *Computer II*, 77 FCC 2d at 468 (¶220).

[137] *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review -- Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, CC Docket No. 96-61, CC Docket No. 98-183, FCC 01-98, *Report and* Order, released March 30, 2001. See *also Enhanced Services Further Notice*, 13 FCC Rcd at 21550-53 (¶¶36-41).

[138] *See id.* at 468-69 (¶¶219-221).

and therefore fall outside of the concerns the Commission addressed in the *Computer Inquiry* proceedings.[139]

The Commission has repeatedly recognized the competitive nature of the broadband industry.[140] In that industry, cable faces strong competition from DSL, as well as from the satellite and wireless industries, that prevents anticompetitive behavior by cable operators. As the Commission observed 20 years ago, "[a]ny private advantages from [cross-subsidization by non-telephone companies] would be short-lived, as customers could readily avail themselves of alternative suppliers."[141] This statement is certainly true for cable operators' provision of ITV services given the proliferation of alternative ITV providers.

E. The Commission Lacks Ancillary Jurisdiction to Impose a Nondiscriminatory Access Requirement

Some argue that the Commission may exercise its "ancillary" jurisdiction to regulate cable-provided ITV services.[142] As we noted in our comments,[143] it is well-settled that the Commission's exercise of "ancillary" authority under Title I must support an explicit, existing statutory responsibility.[144] Any exercise of that authority cannot be "inconsistent" with other

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[139] *Id.* at 468 ¶ 220.

[140] *See* COMMON CARRIER BUREAU, FCC, HIGH-SPEED SERVICES FOR INTERNET ACCESS: SUBSCRIBERSHIP AS OF JUNE, 2000(OCTOBER, 2000) at 2 (noting that "[h]igh-speed lines connecting homes and small businesses to the Internet increased by 57% during the first half of 2000," and that "[h]igh-speed asymmetric DSL (ADSL) lines in service increased by 157%" while broadband cable lines increased by 59% in the same period).

[141] *Computer II*, 77 FCC 2d at 469 ¶ 221.

[142] CU et al. at 9; MSTV at 9-10.

[143] NCTA at n.146.

[144] *See, e.g.*, *United States v. Southwestern Cable Co.*, 392 U.S. 178, 178 (1968) (Commission's authority "is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities…"); *Midwest Video v. FCC*, 440 U.S. 689, 708-709(1971)(holding that the Commission lacked ancillary authority to require cable operators to set aside four channels to be used by certain programmers); *see also Implementation of Video Description of Video Programming*, MM Docket 99-339, 15 FCC Rcd 15230, 15276 (2000) Separate Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part, ("It is important to emphasize that section 4(i) is not a stand-alone basis of authority and cannot be read in

provisions of the Act.[145] Imposing nondiscrimination requirements on cable operators providing ITV services would violate both these requirements.

First, nothing in the Act permits the Commission to exercise its Title I authority to impose a nondiscriminatory access requirement on cable operators providing ITV services. To the contrary, as demonstrated above, several provisions of the Act *preclude* the Commission from taking such a step. The Commission's general grant of authority in Section 4(i) of the Act cannot support exercise of ancillary jurisdiction where, as here, other provisions of the Act and policies supporting the Act dictate against nondiscrimination requirements.

If cable-provided ITV service is a "cable service," the Act specifically prohibits the Commission from imposing common carrier-type regulation on the industry. If cable-provided ITV service is an "information service," there is no statutory responsibility that can be invoked to support the imposition of nondiscrimination requirements. Imposing such requirements would also contradict Section 706 of the Telecommunications Act of 1996, which requires "regulatory forbearance" wherever possible in order to encourage the deployment of advanced telecommunications capability and promote investment in the necessary infrastructure.[146]

The Commission has consistently recognized that a policy of vigilant restraint rather than regulation best fits market conditions and most effectively promotes investment in broadband facilities.[147] As noted, a nondiscriminatory access requirement, by contrast, would deter such

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isolation. It is more akin to a 'necessary and proper' clause. Section 4(i)'s authority must be 'reasonably ancillary' to other express provisions").

[145] *See* 47 U.S.C. § 154(i).

[146] Pub. Law. No. 104-104, § 706(a).

[147] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Report,* 14 FCC Rcd 2398, 2419-2421 (¶¶42-44)(1999)("*First 706 Report*") ("[a]ll this investment, especially that by cable television companies and competitive LECs, appears to

investments by cable operators and others[148] and remove an important competitive spur to investments by other broadband providers, in direct contradiction to the mandates and goals of Section 706.

IV. MANDATORY NONDISCRIMINATORY ACCESS REQUIREMENTS WOULD VIOLATE THE FIRST AMENDMENT

In our initial comments, we demonstrated that a mandatory nondiscriminatory access requirement imposed on cable operators who provide ITV services would violate the First Amendment.[149] Other commenters reached similar conclusions.[150] Curiously – or perhaps not so curiously – *only one set of comments* proposing regulation of cable-provided ITV services addresses the issues surrounding the constitutional implications of imposing a nondiscriminatory access requirement on cable-provided ITV services.[151] This result is in spite of the fact that the

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have spurred incumbent LECs to construct competing facilities"), 2449 (¶101) (rejecting calls for government-mandated access to cable); *see also Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* CC Docket No. 98-146, *Second Report* FCC 00-290 at ¶246(Aug. 21, 2000)("competition, not regulation, holds the key to stimulating further deployment of advanced telecommunications capability"). The Cable Services Bureau's report on broadband similarly concluded that "applying prophylactic 'open access' measures . . . before fuller development of the broadband industry would be unsound public policy that could have the unintended effect of impeding the rapid development of this industry." CABLE SERVICES BUREAU, FEDERAL COMMUNICATIONS COMMISSION, BROADBAND TODAY, A STAFF REPORT TO WILLIAM E. KENNARD, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION, ON INDUSTRY MONITORING SESSIONS CONVENED BY CABLE SERVICE BUREAU (1999) at 42-44 ("BROADBAND TODAY").

[148] *See also* BROADBAND TODAY, at 33-34

[149] NCTA at 49-54.

[150] AT&T at 38-39; Charter at 10-12; Comcast at 10-13; Progress & Freedom at 7-8.

[151] *See* Disney, et al at 26-27. In a confusing footnote in its comments, ALTV cites the D.C. Circuit opinion in *Time Warner Entertainment v. FCC,* No. 94-1035 (D.C. Cir. March 2, 2001) striking down as unconstitutional the FCC rules implementing the Communications Act horizontal and vertical cable ownership provisions and says that decision "did not disturb that court's earlier finding in *Time Warner I* that the statutory basis for the voided regulations was, itself, facially constitutional." ALTV Comments at 4, *citing Time Warner Entertainment Co., L.P. v. FCC,* 211 F.3d 1313 (D.C. Cir. 2000). To the extent this footnote is intended to support the constitutionality of proposed ITV regulation it fails for a number of reasons. The most significant is that, unlike the case with the proposed ITV rules which have *no statutory basis,* the cable ownership provisions at issue in *Time Warner I* were themselves congressional enactments arguably based on a record of alleged industry concentration in 1992 that supposedly *supported* limiting cable ownership in some, yet-to-be-

Commission, in its *Notice*, specifically asked parties to address such issues.[152] And that single filing spends just two paragraphs on the serious constitutional issues raised by the regulatory proposals in the *Notice*.

The sum and substance of the argument is that,"[u]nlike [the] Broward County [case], the Commission would be implementing a Congressional mandate under some combination of Titles I, II, and VI and Section 706, and thus would be entitled to more deference….[and] it would not be imposing must-carry rules, but nondiscrimination requirements."[153]

We need not tarry long with this abbreviated defense. In adopting a nondiscrimination rule, the Commission would *not* be implementing a "Congressional mandate." The proponents are unable to cite any statutory provision giving the FCC express authority to impose nondiscrimination requirements on ITV service providers.

Moreover, Disney et al. argue that the Commission would not be imposing must carry rules, but nondiscrimination requirements. This claim is disingenuous, at best. As we have said, the proposed "nondiscrimination" requirements would be triggered by a cable operator's provision of ITV services. Once such services were offered at all, the operator would be subject to nondiscrimination requirements governing use of its cable facilities for other, unaffiliated, ITV service providers. This is exactly the same type of access requirement – dormant until triggered

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implemented manner by the FCC. In contrast, all we have in this record upon which to base the proposed nondiscrimination rules is speculation.

[152] *Notice* at ¶53.

[153] Disney et al. at 26.

by a cable operator's provision of a particular type of service – that was at issue in the *Broward County* case and which was struck down as a violation of the First Amendment.[154]

And because the proposed access requirements would be triggered by an operator's provision of another service, it is utter nonsense to argue that "[n]ondiscrimination requirements boil down to content-neutral, economic regulations designed to preserve access to ITV."[155] As the *Broward County* court recognized – and common sense compels – such requirements are on a par with the "right of reply" requirements condemned as a First Amendment violation in *Miami Herald Pub. Co., v. Tornillo.*[156]

The plain fact is that the proposed regulation cannot withstand even the intermediate scrutiny test from *Turner.* Under the intermediate scrutiny applied in *Turner*, the government, in order to justify burdens on speech, "must demonstrate that the harm it seeks to prevent is real, not merely conjectural, and that the regulation will alleviate the harm in a direct and material way."[157] The *Broward County* court found the harm the forced access ordinance purported to address – the supposed inability of ISPs to obtain access to "an essential facility" operated by cable operators – "appears to be non-existent."[158] The court noted that the Cable Services Bureau has concluded that "traditional telephone lines 'will remain the principal means of accessing the Internet' in the near term," and that more than 90% of residential Internet users use dial-up ISPs.

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[154] Further, any mandated access obligations also would raise a significant "takings" question under the Fifth Amendment to the U.S. Constitution, because they might involve a permanent physical occupation of each cable operator's property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

[155] Disney et al. at 27.

[156] *Broward County* at 18.

[157] *Turner*, 512 U.S. at 664.

[158] *Broward County* at 25.

Similar findings – based on the speculative nature of the arguments raised by the proponents of regulation as well as the demonstrated fact that cable does not provide an "essential facility" for the provision of ITV services – would result in the conclusion that the proposed nondiscrimination requirements violate the First Amendment.

Given the paucity of the legal arguments supporting the case for a constitutional nondiscrimination requirement, it is little wonder that only one set of comments filed by proponents of regulation even bothered to address the serious constitutional questions that would be raised by such a requirement, even in the face of Commission request for comment on that issue. The First Amendment stands as a clear barrier to the intervention sought by the proponents of ITV regulation.

CONCLUSION

As the record in this proceeding demonstrates, there is no factual, policy or legal basis for the Commission to proceed further in this matter. To the contrary, doing so will only jeopardize the development of this nascent but still promising service.

Respectfully submitted,

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